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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RICKY ORTA,

Petitioner,

-v-

ISRAEL RIVERA, Supt.,

Respondent.

DECISION and ORDER
05-CV-645S

On March 14, 2002, following a jury trial, petitioner, Ricky Orta was convicted of one count of “intentional” murder in the second degree, N.Y. Penal Law. § 125.25(1), and one count of criminal possession of a weapon in the second degree, *id.* § 265.03, and sentenced to twenty-five years to life in prison. (Petition, ¶¶ 1-4). He was also charged with, but acquitted of, an alternative count of “depraved indifference” murder in the second degree, N.Y. Penal Law, § 125.25(2).

The instant petition raises three claims for relief: 1) the jury verdict of “intentional” murder was against the weight of the evidence; 2) the prosecution failed to establish that the out-of-court declaration it was permitted to introduce at trial fell under the excited utterance exception to the hearsay rule; and 3) the prosecution impermissibly cross-examined petitioner about his failure to complain to the police about the victim’s prior threats against him in violation of his right against self-incrimination. (Petition, ¶ 22).

Presently before the Court is petitioner’s renewed motion to hold the petition in abeyance so that he can exhaust additional or new claims in state court. (Docket No. 12). Although not noted on the Court’s Docket Sheet, the motion also includes what appears to be an amended petition, which raises two new claims: (1) the prosecution charged both

“intentional” and “depraved indifference” murder--a “mirror [sic] theory” of the same crime--which deprived petitioner of his right to a fair trial;¹ and (2) ineffective assistance of counsel based on trial counsel’s failure to raise the issue that the prosecution impermissibly charged both “intentional” murder and “depraved indifference” murder.² Because the amended petition raises two additional grounds for relief, the Court must treat it as a motion to amend the petition, see Fed.R.Civ.P. 15(a), and the Court will provide respondent with an opportunity to respond to both the motion to stay the petition and the motion to amend the petition.

Accordingly, the Court hereby directs the Clerk of the Court to amend Docket Entry No. 12 to read as follows: “Renewed Motion to Stay the Petition and Motion to Amend the Petition, with proposed Amended Petition.” The respondent shall file and serve a response to the motions to stay the petition and to amend the petition no later than **January 29, 2007**. Petitioner may file and serve a reply no later than **February 13, 2007**. At that time, the motions will be deemed submitted for consideration.

SO ORDERED.

Dated: January 17, 2007
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

¹See *Policano v. Herbert*, 430 F.3d 82 (2d Cir. 2005); *People v Suarez*, 6 N.Y.3d 202, 811 N.Y.S.2d 267, 844 N.E.2d 721 (2005).

²In the Court’s previous order denying petitioner’s first motion for a stay, the Court advised petitioner that if he renewed his request for a stay, he should include a proposed amended petition that raised the additional or new claims that he wished to raise in the instant proceeding after he had exhausted them in state court. (Docket No. 11).